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No. _____

In The

Supreme Court of the United States

October Term, 1998

IN THE MATTER OF THE APPLICATION OF DIANE SANK TO CONTEST THE ELECTION OF ILAN PLAWKER TO THE OFFICE OF COUNCILPERSON OF THE BOROUGH OF ENGLEWOOD CLIFFS

On Petition for a Writ of Certiorari
To the Supreme Court of the
State of New Jersey

PETITION FOR WRIT OF CERTIORARI

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57 pp

QUESTIONS PRESENTED

This Petition concerns an election contest case. This Petition for Certiorari arises from the denial of a petition for certification by the New Jersey Supreme Court after the New Jersey Appellate Court affirmed a decision of the trial court which dismissed the Petitioner-Plaintiff's complaint for insufficient proof. Petitioner submits that she was denied a fair hearing and the court's rulings ignore the constitutional principal of "one person, one vote." The Petitioner lost the election by six votes. The following questions presented are questions of first impression:

1. Whether the mere existence of unrecorded legal votes in a number exceeding the margin of an election victory is enough to set aside the election results, and if so, is the failure of a Board of Elections to nullify the election a denial of the constitutional principal of "one person, one vote?"

2. Whether allowing a voter to enter the voting booth twice for the purpose of voting is sufficient to declare the second vote illegal and if so is *N.J.S.A.* 19:52-3 as applied repugnant to the constitutional principal of "one person, one vote?"

3. Whether a plaintiff is denied due process and a fair trial by a trial court which admits hearsay as proof of residency for the purpose of voting?

4. Whether a plaintiff is denied due process and a fair trial by a trial court's liberal construction of "residency" that runs contra to the prevailing rules of evidence?

5. Whether the trial court's failure allow a qualified hand-writing expert to testify that six voter's signatures on voting documents were not genuine denied the Petitioner due process and a fair trial?

6. Whether the trial court's aggregate rulings constituted judicial abuse of discretion, thereby denying the Petitioner due process and a fair trial?

LIST OF PARTIES

This is an election contest case. Petitioner-Plaintiff and parties listed below were parties in all proceedings below and are as follows:

Petitioner, Diane Sank, Republican candidate for office of council in Englewood Cliffs, County of Bergen, State of New Jersey

Respondent, Bergen County Superintendent of Elections

Respondent, Bergen County Board of Elections, and

Respondent, Ilan Plawker, Democratic candidate for office of council in Englewood Cliffs, County of Bergen, State of New Jersey

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment below and order of the New Jersey Supreme Court.

OPINIONS AND ORDERS BELOW

This Petition for Certiorari arises from the denial of a petition for certification by the New Jersey Supreme Court after the New Jersey Appellate Court affirmed a decision of the trial court which dismissed the Petitioner-Plaintiff's complaint for insufficient proof. A trial without a jury was held. On January 12, 1996, the trial court issued an oral decision. (Appendix 11a to 14a). On January 18, 1996, a Consent Judgment in favor of the Defendants was filed by the trial judge. (Appendix 8a to 9a). Plaintiff-Petitioner refused to sign the Consent Order. On February 22, 1996, Petitioner filed a timely Notice of Appeal to the Appellate Division of the New Jersey Superior Court. On December 7, 1998, the Appellate Division issued an opinion affirming the trial court's decision. (Appendix 2a to 7a). Petitioner filed a timely Notice of Petition for Certification to the New Jersey Supreme Court. The Petition for Certification was denied without opinion on February 23, 1999, and filed on February 24, 1999. (Appendix 1a). A timely Petition for Certiorari to this Court follows.

STATEMENT OF JURISDICTION

The jurisdiction of this court rests and is invoked under 28 U.S.C. §1257(a). This Petition for Certiorari arises from a denial of certification by the New Jersey Supreme Court, the highest court of the state. This Petition presents claims wherein the Petitioner was denied rights and privileges guaranteed by the Constitution of the United States, and in addition, was injured by state statutes that were constitutional on their face but unconstitutional as applied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment of the United States Constitution states:

> **Section 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. New Jersey State Statutes:

> ***N.J.S.A.* 19:29-1(e). Grounds stated**
> The nomination or election of any person to any public office or party position, or the approval or disapproval of any public proposition, may be contested by the voters of this State or of any of its political subdivisions affected thereby upon 1 or more of the following grounds:
>
> e. When illegal votes have been received, or legal votes rejected at the polls sufficient to change the result.

***N.J.S.A.* 19:52-3.**
No voter after having entered and emerged from the voting booth shall be permitted to re-enter the same on any pretext whatsoever.

***N.J.S.A.* 19:29-7. Witnesses required to testify**
The judge may require any person called as a witness who voted at such election to answer touching his qualification as a voter, and if the court, from his examination, or otherwise, is satisfied that he was not a qualified voter in the election district where he voted, he may compel him to disclose for whom he voted.

STATEMENT OF THE CASE

This is an election case. It presents questions of general public importance that have not, but should be, settled by this court. The same questions arise in one form or another every year, in election after election across these United States to the continual injuries of candidates for public office who lose elections due to election irregularities and to the injury of qualified voters who have their legal votes rejected or diluted by illegal votes. Year after year these voting irregularities are allowed to proliferate and the questions surrounding constitutionally fair elections have evaded this Court's review. Until the questions presented by this petition are resolved, nationwide voter apathy will be encouraged and qualified candidates will be discouraged from seeking office.

The facts surrounding the questions presented by this Petition are defined by the trial transcript, the appellate opinion, and the New Jersey Supreme Court's denial of certification without opinion.

This Petition concerns a general election contest in which the Petitioner was vying for one of two seats on the

Englewood Cliffs council. The Republican Petitioner, a seasoned veteran of many political campaigns (having served ten years on the Englewood Cliffs council), finished the race eight votes behind Defendant Ilan Plawker in the November 7, 1995 General Election according to the official canvas. Her Democratic opponent was a newcomer to partisan politics.

Immediately following the election, Petitioner brought an election contest action to have the results of the election voided and a new election held, based on the obvious irregularities surrounding the election and the number of illegal votes cast. By a preponderance of the evidence, the Petitioner-Plaintiff identified votes of a sufficient number to determine that it was an impossibility for the Board of Elections (that certified the election results) or the trial judge, to determine which candidate had, in fact, won the election.

1) The Trial

Prior to the commencement of trial, Petitioner had submitted to the trial judge a challenge list of 30 voters and early in the trial, the judge held that certain votes were illegal because the voters were not residents of Englewood Cliffs. His ruling served to reduce the margin of the winning candidate's victory to a mere six (6) votes. The remainder of the trial was devoted to establishing whether the Petitioner-Plaintiff could prove by a preponderance of the evidence, that an additional six (or more) votes had been cast illegally.

What followed then, was a rapid series of rulings which were adverse to the Petitioner.

The Petitioner called upon Eileen C. Feldner, the Bergen County Superintendent of Elections, to testify as to the official results of the election and to question her about the eight votes which were cast but were not tabulated by the voting

machine.[1] She testified that 1,964 voting authorities were issued but only 1,956 votes were tabulated. (5T 11-13 to 12-9). The trial judge refused to nullify the election results on the basis of eight rejected votes, ruling instead the plaintiff had the burden to demonstrate that there were enough illegal votes cast during the election that could have changed the result. (8T 39-18 to 19). He completely ignored *N.J.S.A.* 19:29-1(e) which provides that the burden was equally satisfied by a demonstration that eight "legal" votes were "rejected," a number clearly sufficient to show that it was impossible to know which candidate had, in fact, won the election!

Ignoring *N.J.S.A.* 19:52-3, which clearly states that "No voter after having entered and emerged from the voting booth shall be permitted to re-enter the same on any pretext whatsoever," the trial judge refused to invalidate the *second* vote of Mrs. Messinger, a Democratic Party challenger, who entered the voting machine twice to vote. When asked about this, Messinger testified:

> Q. And did you go back into the booth?
> A. Yes, I did.
> Q. And did you vote?
> A. Yes, I did. [7T 69-24 to 70-2].

The trial judge refused to follow the New Jersey's rules of evidence and refused to invalidate votes cast by a significant number of non-resident voters. (see Point III).

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[1] The eight vote discrepancy was discovered by counting the number of voting authorities issued to voters to enable them to enter the voting machines and cast their ballots and the number of votes tabulated by the voting machines' counter mechanism. Poll workers attend each machine and collect the authorities before allowing a voter to enter the machine and an electronic tone sounds when the vote is tabulated so that the attendant is alerted and can question a voter who exits the booth without recording his vote.

And as a final insult to the Petitioner-Plaintiff's case, the trial judge refused to allow her pre-qualified handwriting expert to testify as to the ungenuine signatures of *six* voters. Making an "error" in tallying up the number of signatures challenged, the judge ruled that *five* signatures were insufficient to change the results of the election. This egregious error was committed even after being advised twice by the Petitioner's attorney that *six* signatures were challenged! (see Point III).

2) The Appeal

The appellate court's opinion affirmed the trial court's oral decision "substantially for the reasons stated by Judge Troast (the trial judge) on the record." (7a). The appellate court found that Judge Troast's "finding of facts and conclusions of the law [were] amply supported by the credible evidence." (7a). Furthermore, issues raised by the Petitioner were without merit and required no further discussion as per *R*. 2:11-3(e)(1)(A) and (E).[2] (7a).

In order to reach their decision, the appellate court took the pains to actually reword the Petitioner's points on appeal that were contained in the *Appellant* Brief, thereby emasculating the legal relevance of crucial issues so that they

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[2] The 1997 Current *Rules of Court for the State of New Jersey*, *Rule* 2:11-3(e)(1)(A) and (E) states "(e) Affirmance without Opinion. (1) Civil Appeals. When in a civil appeal the Appellate Division determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (A) that a judgment of a trial court is based on findings of fact which are adequately supported by evidence; (E) that all issues of law raised are clearly without merit and the court determines that an opinion would have no precedential value; then and in any such case the judgment or order under appeal may be affirmed without opinion and by an order quoting the applicable paragraph of this rule.

appeared to an outside observer to be without merit — thereby eliminating the need for appellate review. For example, the Appellate court reworded Point XI so that it read, "WHETHER THE COURT ERRED BY LETTING STAND MESSENGER'S VOTE, DESPITE HER TWO VOTING *ATTEMPTS*?" (7A). (emphasis added). The Petitioner's point stated in its original form read "THE COURT ERRED IN ALLOWING THE VOTE OF PATRICIA MESSINGER TO STAND DESPITE CLEAR VIOLATION OF *N.J.S.A.* 19:52-3."

By ignoring the evidence presented at trial and refusing to review the transcript, the appellate court's decision ignored questions of great importance to the general voting public.

3) The Petition for Certification

The New Jersey Supreme Court refused to grant the Petitioner's request for Certification which was predicated upon issues of great public importance to its residents, issues of state and federal constitutional import, and the fact that the opinion of the appellate court contradicted a sister appellate court in *In the Matter of Candidates to New Jersey General Assembly*, Unpub. Op., Dkt. No. A-4832-97T3, dec. Sept. 2, 1998, (Appendix 15a to 24a), which stated in no equivocal terms:

> This appeal centers on the meaning of *N.J.S.A.* 19:29-1(e) which provides that voters may contest a nomination or election 'when illegal votes have been received, or legal votes rejected at the polls sufficient to change the result.' At issue is whether the mere existence of unrecorded legal votes in a number exceeding the margin of victory is enough to set aside the election results. We think it is. [15a].

REASONS FOR GRANTING THE PETITION

POINT I THE CONSTITUTIONAL VALIDITY OF *N.J.S.A.* 19:29-1(E) IS AN ISSUE OF GREAT PUBLIC IMPORTANCE BECAUSE AS THE STATUTE IS APPLIED, IT IS REPUGNANT TO CONSTITUTIONAL PRINCIPAL OF "ONE PERSON, ONE VOTE."

Title 19 of the New Jersey statutes represents the attempt of New Jersey's legislature to protect voters rights and insure a procedurally fair election process. When enacted, "deterrence of fraud" — and the "maintenance of the integrity of the elective process" was a primary legislative concern. *In re Battle*, 190 *N.J. Super.* 232, 236-237 (App. Div. 1983).

N.J.S.A. 19:29-1(e) states:

> The nomination or election of any person to any public office or party position, or the approval or disapproval of any public proposition, may be contested by the voters of this State or of any of its political subdivisions affected thereby upon one or more of the following grounds:
>
> e. When illegal votes have been received, or legal votes rejected at the polls sufficient to change the result;

The Petitioner submits to this Court, that at trial the preponderance of evidence presented, substantiated her claim that eight legal votes were not tabulated or recorded -- which was a sufficient number to set aside the election results, and that the trial court could not, with reasonable certainty, determine who received a majority of the legal votes. Evidence of the missing eight votes was attested to by the Bergen County Superintendent of Elections, who also said this was not an unusual situation and attributed it to "voter confusion."

The instant facts in evidence are clear-cut: Eileen Feldner, Superintendent of Elections, certified that 1,964 voting authorities were issued by the poll workers during the Englewood Cliffs General Election and that the counters on the voting machines registered only 1,956 votes -- a shortfall of eight votes. (5T 11-13 to 12-9). These eight votes, by definition, were "open ballots" because they presented an impossibility for a court to determine for whom the eight votes were cast. *In Re General Election of Maplewood*, 255 *N.J. Super.* 690, 744 (Law Div. 1992). Pursuant to *N.J.S.A.* 19:29-1(e), eight votes was more than a sufficient number to overturn the elections results.

In the instant case, the trial judge and the appellate court erroneously confused the true issue presented by the fact that eight votes were not tabulated. These courts "characterized" the failure of the election officials and/or the voting machines to correctly tabulate eight votes as an non-issue, caused by "fled" or "confused" voters. The Appellate Court affirmed the trial court's decision "to refuse to set aside the election on the ground of voter confusion" on the trial court's finding that "an eight-vote discrepancy between the number of authorities to vote and the number of votes reported on the machines, the level of error was not unusual and did not indicate an unfair result. (3a).

The facts of the *Maplewood* trial are very similar to the instant facts. In both cases, following a recount, the Petitioners filed verified complaints pursuant to *N.J.S.A.* 19:29-1, et seq. Both Petitioners claimed, *inter alia*, that due to voting irregularities, legal votes were not counted and illegal votes were counted. In reasoning their decision to overturn the election, the *Maplewood* Court emphasized

> The right to vote in a democracy is among the most precious of all individuals' rights. It is a mechanism which individuals can and do use to hold governments accountable, even when other parts of the political process fail to produce accountability. For one's vote, when cast, to be translated into a true message to government and candidates, that vote must be accurately counted, and, if necessary, recounted at every stage of the election process.***The moment an individual's vote becomes subject to an error in the vote tabulation process, the easier it is for one's vote to be diluted. *Maplewood, supra* at 696.

The Petitioner submits that the trite characterization of the disenfranchisement of eight voters, cloaks the judicial denial of a Constitutional right that is at issue. Simply stated, the right to vote is a federally protected right and cannot be taken from a voter through dilution or a failure to count a vote. See *Griffin v. Burns*, 570 *F.2d* 1065 (1st Cir. 1978) (the right to vote is a federally protected right); and *U.S. v. Mosley*, 383 *U.S.* 904 (1915) (the right to vote includes the right to have that vote counted at its full worth).

When affirming the trial court's decision, the appellate court noted that the trial judge rested his decision upon the testimony of Eileen Feldner, the Bergen County Superintendent of Elections, who "testified that it was not unusual, with any machine, for a voter to flee, that is, to sign in and receive a voting authority slip but leave without actually voting. Board workers were instructed to void the voting authority slip used for that voter if they saw this happen. * * * When voter authority slips exceeded the machine tally, it was because some voters walked out without voting or failed to follow directions to register the vote." (4a).

The petitioner submits to this Court that the lower courts' decisions rested on evidence that was totally without

precedent or legal relevance. *N.J.R.E.* 401 defines "relevant" evidence as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." This current rule is a codification of the holding in *State v. Huchins*, 241 *N.J. Super.* 353, 358 (App. Div. 1990), which held that in determining whether evidence is relevant, the inquiry should focus on "the logical connection between the proffered evidence and a fact in issue." The issue before the trial court was "how many legal votes were rejected?"

The Petitioner submits that in the instant case, Feldner's testimony was pure speculation and totally irrelevant. Her testimony failed to link the eight voting authorities in question to specifically identified voters who either fled without voting or were confused and did not cast a vote. Her testimony was "so unrevealing as to be irrelevant," *State v. Allison, 208 N.J. Super.* 9, 17 (App. Div. 1995); see also *McCormick on Evidence*, §185, at 774 (4th ed. 1992).

Her testimony did, however, have the clear and unmistaken capacity to confuse and mislead the factfinder and the Appellate Court away from the real issue -- that eight votes were never tabulated and they constituted a number sufficient to overturn the election results!

POINT II THE CONSTITUTIONAL VALIDITY OF *N.J.S.A.* 19:52-3 IS AN ISSUE OF GREAT PUBLIC IMPORTANCE BECAUSE AS THE STATUTE IS APPLIED, IT IS REPUGNANT TO THE CONSTITUTIONAL PRINCIPAL OF "ONE PERSON, ONE VOTE."

N.J.S.A. 19:52-3 clearly states "No voter after having entered and emerged from the voting booth shall be permitted to re-enter the same on any pretext whatsoever."

This statute was enacted to deter fraud, safeguard the secrecy of the ballot and to preserve the enfranchisement of qualified voters. *In re Matter of Petition of Byron*, 165 *N.J. Super.* 468, 474 (Law Div. 1978). It was meant to keep individuals from casting more than a single vote.

According to the facts of the instant case, Mrs. Messinger, a Democratic poll watcher, arrived at 9 a.m., filled out a voting authority, and voted. (3T 52-3 to 8). When she stepped out of the booth, other voters behind her who were in line to vote, voted. "People [were] walking in and voting on that machine." (7T 10-1 to 6). Some minutes later, according to Republican challenger Bancroft, Ralph Slater, a Democrat poll worker approached Mrs. Messinger and asked, "Did you press the button?" to which she replied, "Ralph, I"m not stupid." (7T 9-8 to 16). He then proceeded to convince Messinger to vote a second time. (7T 9-20 to 21).

Mr. Slater testified that he telephoned Eileen Feldner, Superintendent of the Board of Elections, and that she personally told him that Mrs. Messinger should re-enter the voting machine and cast another vote. (3T 64-19 to 24). The Petitioner submits that it is not credible that Feldner would instruct Mr. Slater to tell Mrs. Messinger to flagrantly violate election law.

The Petitioner submits that the trial court erred in failing to invalidate Mrs. Messenger's second vote, and erred a second time in failing inquire as to how she voted as per *N.J.S.A.* 19:29-7. Presumably, since Messinger was a Democratic poll watcher, she voted for fellow Democrat Plawker, and Defendant Plawker would have lost another vote in his slim margin at the polls.

The legal principal governing the trial judge's erroneous failure to invalidate Mrs. Messenger's vote is clearly governed by *Ramsey v. Morris*, 121 *N. J. Super.* 430 (Cha. Div.

1972), which held "If the legislative intendment is clear and unambiguous, the court will not * * * indulge in a presumption, arising from extrinsic evidence, that the Legislature intended something other than what it actually expressed." *Bass v. Allen Home Improvement Co.*, 8 *N.J.* 219 (1951). "A construction that will render any part of a statute inoperative, superfluous or meaningless, is to be avoided. * * *" See *In re Keogh-Dwyer*, 106 *N.J. Super.* 567, 571 (Law Div. 1969), aff'd 54 *N.J.* 523 (1969).

Petitioner submits that the failure of the trial court to discount Messenger's second vote was clearly in error. Her second vote served to cancel or dilute a vote legally cast by another — a violation of the Constitution's "one person, one vote" principal.

POINT III THE PETITIONER'S 14TH AMENDMENT RIGHT TO A FAIR TRIAL WAS DENIED BY COURTS WHICH ALLOWED VOTES TO BE VALIDATED BY HEARSAY, EXTRINSIC EVIDENCE, AND JUDICIAL PRACTICES TANTAMOUNT TO ABUSE OF DISCRETION

A. The trial judge's liberal construction of "residency" and admitting hearsay to overcome petitioner's proofs that certain voters were not residents, denied the petitioner's right to confrontation, cross-examination, and a constitutionally fair trial.

During the trial, several Democratic absentee voters were challenged because they were non-residents. For example, the four Clementes voted absentee from Florida. Their non-residency was discovered when service was attempted. Their votes were originally challenged because Petitioner's handwriting expert opined that their signatures were not

genuine. The trial judge failed to declare the four Clemente votes illegal for non-residency and deduct four votes from Plawker's total based on Petitioner's proofs indicating their Democratic political persuasion.

While the election laws regarding absentee ballots are to be liberally construed to avoid disenfranchisement, voting by absentee ballot is not an absolute right. See *In Re Petition of Battle, supra* at, 236; *Mulcahy v. Bergen County Board of Elections*, 156 *N.J. Super.* 429 (Law Div. 1978); and *Antieau, Municipal Corporation Laws*, §17.19 at 568.1 (1973). The maintenance of the integrity of the elective process is a primary concern. *In re Petition of Battle, supra* at 236-237.

In Application of Murphy, 101 *N.J. Super.* 163, 170 (App. Div. 1968), the court ruled "Proof as to how an 'illegal voter' voted may take several forms. Upon a determination by the court that a voter is not qualified, he may be compelled to disclose for whom he voted." *N.J.S.A.* 19:29-7. Furthermore,

> [c]ircumstantial evidence is admissible to prove for whom illegal votes were cast at an election. * * * Among the circumstances that may be considered are * * * [t]he party affiliations of the voter, and the relations between the voter and the candidates, or between him and others actively interested in advancing the cause of certain candidates, * * *." *26 Am. Jur. 2d*, Elections, §348. *Id.*

Roger Plawker, Esq. was most certainly a non-resident who voted absentee for his Defendant father. During the trial, he testified that he lived at an apartment in Hoboken with his girlfriend with whom he had signed a "residential" lease, (2T 154-10 to 16), a fact corroborated by the landlord. (2T 141-25 to 150-22). Roger testified that the apartment was also his

law office. He admitted that he slept and kept his clothes there. His car registration, bank records, and credit cards indicated his Hoboken address. (2T 150-25-1 to 156-7). And although Roger never filed a Title 19 Declaration of Residency, he maintained that he was a resident of his father's house in Englewood Cliffs even though he stayed there overnight only "on occasion." (2T 164-4 to 9). The trial judge found Roger Plawker a resident of Englewood Cliffs.

Julie Globus was an itinerant student who lived in Israel for four years, (2T 73-15 to 19), spent two weeks at her parents home in Englewood Cliffs in October of 1995, (2T 74-8 to 15), then bought and moved into a condo in North Bergen. (2T 76-25). She stated to the court

> We were officially out of my parents' house some time in late October, mid to late October, and we have now been in North Bergen since then and we are planning to go back to Israel in two years. (2T 74-15 to 18).

The Petitioner submits that the trial judge's ruling that Mrs. Globus had sufficient contacts with her parents in Englewood Cliffs to use their address for voting purposes is a clear judicial abuse. (2T-129-1 to 23).

On October 8, 1994, registered Democrat Maria Marinuzzi Tullo married and with her husband moved to Englewood (not to be confused with Englewood Cliffs). Her driver's license showed her to be an resident of Englewood as of March of 1995 as did her auto registration and insurance. (3T 81-8 to 20; 89-8 to 14). The Tullos eventually purchased a house in Englewood Cliffs but the closing occurred after the General Election on November 20th. (3T 95-3 to 11). The trial court declared her to be a resident of Englewood Cliffs and allowed her vote to stand! (3T 108-10 to 14).

The Petitioner submits that the trial judge used his liberal construction rule for "residency" as a wholesale license to declare all votes to be valid, irrespective of the evidence to the contrary — and that his liberal use of this rule precluded the Petitioner's goal of acquiring the six votes necessary to overturn the election.

In *Maplewood*, the court sanctioned the practice of applying a more "lenient standard for proof of election domicile than might apply elsewhere" because such a practice would injure the rights of legal voters. "The interest to be protected here is that of the "public interest." The interest of the voters who are legally entitled to vote is not to have their votes diluted by illegal voters." *Maplewood, supra* at 704. The *Maplewood* Court lamented

> Why grant an illegal voter greater protection than afforded a legal voter? It is obvious that an illegal voter, by voting wrongfully, dilutes the rights and votes of all legally qualified voters. Thus the illegal voter should be afforded no greater protection than a legal voter. *Id.*

The Petitioner submits to this court that not only was the trial judge's evidentiary rulings prior to his decision clearly erroneous and fatally prejudicial to the Petitioner's complaint, they also qualify under New Jersey's abuse of discretion test. *In State v. Roth*, 95 *N.J.* 334 (1984), the court held that 1) the exercise of discretion by a trial court must be based upon findings of fact that are grounded in competent, reasonably credible evidence, and 2) the "factfinder [must] apply correct legal principles in exercising its discretion." The *Roth* Court ruled that they would exercise their powers of judicial review when the trial court's application of the facts to the law was such a "clear error of judgement that it shocks the judicial conscience."

B. Six (6), not five (5), signatures were opined to be not genuine by Petitioner's handwriting expert, a sufficient number to change the results of the election.

The Petitioner submits to this reviewing Court that she was denied a fundamentally fair trial pursuant to the 14th Amendment when the trial judge refused to allow her handwriting expert to testify, violating *N.J.R.E.* 611(a)(1), which gives the trial judge "reasonable" control over the presentation of evidence so as to "make the interrogation and presentation effective for the ascertainment of truth." In *Cardell, Inc. v. Piscatelli*, 227 *N.J. Super.* 149, 154-155 (App. Div. 1994), the court held that a trial judge "should not infringe upon the right of all parties to litigation to present witnesses, as that is an essential element in the conduct of a trial." Furthermore, in the instant case, the Petitioner submits that the judge's decision to deny her the right to present expert testimony, deprived her of due process which is the hallmark of a fair trial.

The trial record is clear. According to the handwriting expert's report which was entered into evidence, the expert would have presented credible evidence which could have overturned the election results. (See handwriting expert's report at 25a). The judge's ruling removed the Defendants' burden to prove that the expert's testimony was not credible. They were relieved of the burden of producing a counter-expert, or the voters themselves to attest to their signatures.

The Petitioner submits to this reviewing Court that the trial judge's ruling tipped the scales of justice in favor of the Respondents, causing the Petitioner irreparable prejudice. The record is clear. On the last day of the trial, the Petitioner

submitted a report from her handwriting expert,[3] to the court, (25a), which was entered into evidence. At this point in the trial, inasmuch as the court had already ruled against the Petitioner on the issue of the eight open ballots, the Petitioner was prepared to prove by expert testimony, that six more votes had been illegally cast for Defendant Plawker. "Six" was the precise number of votes the Petitioner needed to overcome the results of the election.[4]

The trial judge based his denial of the expert's testimony on his finding that even if the Petitioner's expert proved that *five* absentee ballots were illegal, this was an insufficient number to change the results of the election. This finding was particularly egregious inasmuch as the trial judge had a copy of the report before him and the Petitioner pointed out to the court that *six, not five*, signatures were challenged by the expert's report. Regardless, the judge ignored the report and the Petitioner, ruling that only five signatures were challenged. (8T 6-14 to 19; 7-17 to 20).

The expert's report was very concise and clearly written. In it, the expert opined that with regard to certain ballots, six signatures were not genuine, to wit

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[3] It should be noted by this reviewing Court that the Petitioner's handwriting expert, Patricia Siegel, was well-qualified to testify before the instant court, having been deposed as an expert many times in State and federal courts.

[4] Petitioner's attorney told the court "Dr. Sank is instructing me to challenge Gregory Zolla's [sic] vote as a result of what the handwriting expert has divulged." (8T 6-14 to 19). Furthermore the court specifically asked the Petitioner's attorney "Mr. Morrow, does this report help you with six or five votes?" Morrow replied, "Well, assuming that Gregory Zolla [sic] [is in] question now, I would say six." (8T 7-17 to 20).

1) Stephanie Zola
2) Gregory Zola
3) Anna Clemente
4) Maddalena Clemente
5) Vinny Clemente
6) Donato Clement

The "Opinion" section of the two page report, contained two sub-sections which were typed in bolded and underlined type, drawing the attention of the reader to the fact that *two* Zola siblings were part of one opinion, and the *four* members of the Clemente family were a part of a second opinion.

In her report, the expert opined that Penni Zola,[5] the mother of siblings Stephanie and Gregory, had filled out their Voter Registration forms. The expert also pointed out that Stephanie Zola's and Gregory Zola's registration forms were "signed September 15th and 16th respectively, but were witnessed by Ilan Plawker [the Defendant] on August 2, 1995."[6] The Petitioner submits that regardless of whether the signatures were genuine, the fact that the candidate witnessed the absentee ballot applications "in blank," the two votes for Plawker, should have been declared illegal!

Neither Gregory or Stephanie Zola appeared in Court to legitimize their votes.[7] When the Petitioner's counsel began to

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5 During the trial, Penni Zola, Gregory's mother testified that she saw her son sign the registration form. The Petitioner submits that the mother's testimony was tainted and self-serving inasmuch as the handwriting expert opined that the mother signed her children's registration forms. (8T 6-24 to 7-6).

6 The mother of the Zola siblings testified that her daughter had lived and voted in California (8T 102-5 to 8; 8T 10-1 to 3), and by the time the trial convened, Stephanie was working and living in New York city. Stephanie was served at her residence in New York.

7 When service was attempted for Stephanie Zola in Englewood Cliffs, the process server noted that he was told that she lived in New York where she was later served.

request bench warrants to compel appearances, the trial court ignored his request, and proceeded to move the case forward. (6T 82-2 to 12; 7T 65-9 to 15; 7T 75-20 to 76-11). The trial court did, however, expressly overrule the Defendant's objection to allowing the handwriting expert to challenge Gregory Zola's signature! (6T 99-23 to 100-19). Gregory was the sixth voter challenged by the Petitioner.

In addition to the Zola siblings, the Petitioner's expert opined in her report that the four signatures on the Clemente family's absentee ballots were not genuine.[8]

POINT IV UNTIL THIS COURT SETTLES THE CONSTITUTIONAL ISSUES PRESENTED HEREIN WHICH LOWER COURTS HAVE HERETOFORE DECLINED TO ADDRESS, VOTERS AND CANDIDATES FOR PUBLIC OFFICE WILL BE INJURED AND THESE ISSUES WILL CONTINUE TO EVADE REVIEW.

Although a resolution of the questions presented in this case could be characterized as "moot" insofar as the time has passed wherein Petitioner could serve on the Englewood Cliffs council by being granted a new election, the Petitioner will continue to be injured by the onerous application of the rules and statutes complained of herein because the injuries sustained by the Petitioner are surely capable of repetition.[9] Furthermore, inasmuch as the New Jersey courts continue

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[8] The Clementes were non-resident voters. Three were served at their residence in Florida and Donato was served at his business location, a bakery, in Florida.

[9] Petitioner is currently the unopposed candidate in the Republican Primary for the office of council in Englewood Cliffs on the date of the filing of this Petition.

and the appellate and Supreme Court refuse to settle these meritorious issues, they will continue to evade review.

Petitioner relies upon this Court's ruling in *Morse et al. v. Republican Party of Virginia*, ___ *U.S.* ___ (1996). In that case the Court took note that "Like other cases challenging electoral practices, *** this controversy is not moot because it is 'capable of repetition, yet evading review.'" Citing *Anderson v. Celebrezze*, 460 *U.S.* 780, 784, n. 3 (1983); *Storer v. Brown*, 415 *U.S.* 724, 737, n. 8 (1974); *Moore v. Ogilvie*, 394 *U.S.* 814, 816 (1969).

CONCLUSION

For all of the aforementioned reasons, the Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

DIANE SANK, *Pro Se*
Date: May 22, 1999